

**DISCHARGE FOR A POSITIVE DRUG TEST**  
**ON OR AFTER 01-01-05**

Missouri Employment Security Law, Section 288.045, calls for cancellation of part or all of the wage credits earned with an employer, if the worker was discharged on or after 01-01-05 because of testing positive for non-prescribed controlled or illegal drugs. [REDACTED]  
[REDACTED] Division policy is to cancel all wage credits earned with the discharging employer. [REDACTED]  
[REDACTED]

A discharge for refusal to submit to a drug or alcohol test or submitting an adulterated sample does not fall under 288.045. If the employer does not test a worker because of self-admission to drug or alcohol use, Section 288.045 does not apply. These examples could be misconduct under Employment Security law, Section 288.050. Also apply Section 288.050 when the employer is unable to provide all the documentation required under 288.045, and the claimant has clearly violated the employer's drug-free workplace policy.

To apply 288.045, these conditions must be met:

- The worker must have been notified of the employer's drug-free policy. The policy must state that a positive test may result in termination. A test may be given if sufficient cause exists or on a random basis. If a test is random, the policy must clearly state that there will be random testing.
- If an employer initiates a new drug testing policy after 01-01-05, the employer must allow 60 days from a one-time notice to all employees before testing is done.
- The test must not be a pre-employment drug screen.
- The worker must have been at work with a detectable amount of alcohol or controlled substance in his/her system.
- The test must have been conducted at a lab certified by the Department of Health and Human Services (HHS).
- If the worker is a part of a collective bargaining agreement (CBA) that calls for testing at a facility other than an HHS certified lab, the lab must follow Department of Transportation (D.O.T) chain of custody guidelines.
- For carboxy-tetrahydrocannabinol, which is marijuana, the test result must be at least 50 nanograms per milliliter.
- The worker has the right to request that the sample be retested at a different lab, if he/she questions the lab results. If the employer refuses to allow the second test, no misconduct can be found under 288.045. Misconduct could still be found under 288.050. The worker is required to pay for the confirmation test only if the result is positive again. However, if the worker does not have the second test done because of not having the money to pay for it, it will be ruled as no second test was requested. The worker would have to seek reimbursement from the employer if the second test was negative.
- The employer must provide documentation for the record. (See page 3)

An example of how to write an **adverse** determination is: "The claimant was discharged because he tested positive for drugs. The test was given in accordance with the employer's drug free policy, using D.O.T. guidelines as specified in Missouri Employment Security Law, Section 288.045. Wage credits earned from 10-01-03 thru 02-03-05 are cancelled."

### **QUESTIONS FOR CLAIMANT ON POSITIVE DRUG TEST**

- Why were you tested for drugs?
- What were your job duties?
- Does the employer have a drug policy?
- What is the policy?
- Were you informed of the drug testing policy prior to testing? If so, when and how?
- Does the policy state a positive test result is considered misconduct and may result in suspension or termination of employment?
- Are you a member of a union with a CBA governing drug testing?
- Was a urine test administered? If not, what kind of test was administered?
- Where was the drug test given?
- Were you sent from work to take the drug test?
- What was the date of the drug test?
- What was the date of your discharge?
- Describe the process of obtaining the sample.
- For what drug(s) did you test positive?
- Did you use the drug(s) for which you tested positive?
- Did you use any illegal drugs or drugs that were not prescribed for you?
- If not, do you know why you tested positive?
- Did a medical review officer call you to discuss the results of the test?
- Did you ask the employer to retest the sample? If so, what was the result?

### **QUESTIONS FOR EMPLOYER ON POSITIVE DRUG TEST**

- Why was the claimant tested? Find out specifically why the claimant was suspected of being under the influence. Try to obtain specific details.
- What were the claimant's job duties?
- What is your drug policy?
- When and how was the claimant informed of the drug testing policy?
- When was it put into effect?
- Does the policy state a positive test result is considered misconduct and may result in suspension or termination of employment?
- Is the employee a member of a union with a CBA governing drug testing?
- What was the date of the drug test?
- What was the date of the discharge?
- Was the claimant sent from work to be tested? If not when was the employee tested?
- Where was the tested given?
- Where was the sample tested?
- Was the test conducted per DOT procedures or in accordance with the CBA?

- What was the drug(s) for which the claimant tested positive?
- What was the level(s) of the test results?
- Did the claimant admit or deny drug use?
- Did the claimant ask that the sample be retested? If so, did you deny the request?

### **DOCUMENTS THE EMPLOYER MUST SUBMIT**

- A copy of the employer's drug testing policy or CBA, if applicable. It would be best to have a document with the claimant's signature acknowledging receiving/understanding the policy, particularly if the claimant denies having been informed of the policy.
- A copy of the chain of custody form from the place where the claimant was sent to submit the urine sample. Section 288.045 can still apply without a chain of custody form, if the employer cannot provide one, especially when all parties agree to the test results. It could be a problem if the claimant disagrees with the results and challenges the chain of custody.
- A copy of the lab test result showing the level(s) of the test results. This is not the Medical Review Officer (MRO) report. In some cases it may be necessary to call the MRO to get the lab report.
- A copy of the MRO report, if the claimant states the MRO was provided information regarding prescribed medication that could have caused the positive result.
- If a certified lab was not used because of a collective bargaining agreement, a copy of the section of the collective bargaining agreement specific to drug testing is needed.

### **DOCUMENTS REQUIRED IN THE RECORD**

- A list of HHS certified labs for the month and year the claimant was tested.
- A list of the accepted drug cut-off amounts needed for a positive test.

### **EXAMPLE OF TESTING PROCEDURE**

Below is an example of how a drug test may be administered:

The worker is sent from work to a facility that handles drug testing and asked to provide a urine sample. The worker gives the vile containing the urine sample to a certified technician. The technician checks to ensure that the sample is the correct color and temperature. A test strip is used to collect a small sample to test. The urine is split into two containers and sealed. The technician numbers the containers and has the claimant sign the chain of custody form to acknowledge the paper work and the information on the containers match. During this entire process the urine sample should not have left the worker's or technician's sight. If the test strip indicates a possible positive result, one of the urine samples is sent to a certified lab to be tested.

If the test done by the certified lab is positive for a drug or drugs, the result is sent to a MRO. Normally, the MRO is independent from the lab. The MRO attempts to contact the worker for questioning regarding medication taken. If this information could affect the test result, the information is given to the lab. The lab does another test to determine how the medication would affect the reading. The result is a reading that indicates the level of the medication (L) and the level

of illegal drugs (D). For example, a Vicks inhaler could affect the reading for methamphetamines. The follow-up test could show a 6% reading for the Vicks inhaler and 94% reading for illegal methamphetamines.

If the worker disagrees with the test results, the worker may ask the employer to have the sample retested. This does not mean the worker has the right to provide a new urine sample, because by then the drugs may be out of his/her system. If a confirmation test is done, the second split sample is sent to a different certified lab that has no connection with the lab performing the first test.

There are various methods used in administering a drug test, some more sophisticated or technical than others. The above is just one example.